Mustafa bin Osman v Lee Chua & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO M- 04-46 OF 1995
GOPAL SRI RAM, SITI NORMA YAAKOB JJCA AND MOKHTAR SIDIN J
17 APRIL 1996

Contract *— Illegality — Property in chattels and land — Whether property in chattels and land could pass under illegal contract*

Contract *— Illegality — Parties in pari delicto — Agreement prepared by solicitor — Whether contract void — Contract Act 1950 s 66*

Civil Procedure *— Pleadings — Illegality of contract — Whether need to be specifically pleaded*

The appellant was the registered proprietor of a piece of land in Malacca ('the land') which was governed by the National Land Code (Penang and Malacca Titles) Act 1963 ('the Act'). By a deed of assignment dated 9 March 1981, the appellant absolutely assigned a house on the land to the respondent for a sum of RM10,000. By another agreement of the same date ('the tenancy agreement'), the appellant let to the respondent that portion of the land on which the house stood, at a monthly rent of RM15. Both documents were prepared by a solicitor. On 28 May 1993, the appellant gave the respondent a notice terminating the tenancy, and requiring the latter to quit and deliver vacant possession of the premises. It appeared that the parties did not realize that the tenancy agreement was an illegal agreement caught by s 108 of the Act which prohibited the land from being transferred, leased, transmitted or charged to any person other than a Malay. Section 108 included, within the definition of the expression 'lease', any tenancy of whatever form or duration. The appellant brought an action against the respondent in the magistrates' court for vacant possession of the land. The appellant's statement of claim expressly pleaded, and relied upon, the illegal tenancy agreement. It was alleged that the respondent had failed to abide by the terms of the tenancy agreement and the notice to quit. The respondent, in his defence and counterclaim, challenged the validity of the notice to quit, alleged that it was the appellant who was in breach of the terms of the tenancy agreement and claimed damages for breach. Although the respondent did not plead illegality, she purported to take the point as a preliminary objection as to the locus standi of the appellant to bring the action at the hearing. The magistrate heard argument and decided in favour of the appellant on the ground that the respondent was a monthly tenant, so that the notice to quit had had the effect of terminating the relationship of landlord and tenant. The respondent then appealed to the judicial

commissioner who proceeded on the basis that the tenancy agreement was illegal and void, and decided that the appellant's claim was unsustainable. The appellant appealed, arguing that the effect of the judicial commissioner's decision was to permit the occupation of land by one who was disabled by statute from having possession.

Held, dismissing the appeal:

(1) Illegality need not be specifically pleaded, and that once the illegality is brought to the attention of the court before whom the action is being tried, the court, upon being satisfied that the transaction is indeed illegal, is obliged to act upon it (see p 146C–D); *Natha Singh v Syed Abdul Rahman & Anor* [1962] MLJ 265 and *Nasib Singh v Ramasamy* [1969] 1 MLJ 211 followed.

(2) The appellant's statement of claim claimed vacant possession expressly on the basis that the respondent had acted in breach of the tenancy agreement. Accordingly, the appellant relied upon the illegality to claim possession of the land. This, therefore, was a case where the maxim *ex turpi causa non oritur actio* applied with full vigour (see pp 147I and 148A).

(3) The parties in the present case were in pari delicto when they entered into the illegal tenancy agreement. After all, the tenancy agreement was prepared by a solicitor. This was, therefore, not a case where the contract may be said to be discovered to be void under s 66 of the Contracts Act 1950 (see p 148B); *Soh Eng Keng v Lim Chin Wah* [1979] 2 MLJ 91 followed.

(4) In this case, it was the appellant who offended the terms of the statute and risked forfeiture of the land by the state authority (see p 148D).

(5) It is settled law that property in chattels and land can pass under an illegal, and therefore unenforceable, contract. Consequently, the property in the house having passed to the respondent, and he having been put in occupation of the land, the loss should be borne by the appellant (see p 148D–E); *Tinsley v Milligan* [1993] 3 All ER 65 followed.

[Bahasa Malaysia summary

Perayu merupakan tuan punya berdaftar sebidang tanah di Melaka ('tanah tersebut') yang dikuasai oleh Akta Kanun Tanah Negara (Hakmilik Pulau Pinang dan Melaka) 1963 ('Akta tersebut'). Melalui suatu suratikatan penyerahhakan bertarikh 9 Mac 1981, perayu telah menyerahhak secara mutlak sebuah rumah di atas tanah kepada penentang untuk jumlah RM10,000. Melalui suatu lagi perjanjian pada tarikh yang sama ('perjanjian penyewaan tersebut'), perayu telah menyewa kepada penentang bahagian tanah di mana rumah

tersebut didirikan, pada sewa bulanan sejumlah RM15. Kedua-dua dokumen telah disediakan oleh seorang peguamcara. Pada 28 Mei 1993, perayu memberi penentang suatu notis membatalkan penyewaan tersebut, dan menghendaki penentang keluar dan menghantar-serah milikan kosong premis tersebut. Nampaknya pihak-pihak yang berkenaan tidak menyedari bahawa perjanjian penyewaan tersebut merupakan satu perjanjian yang menyalahi undang-undang yang dirangkumi oleh s 108 Akta tersebut yang melarang tanah tersebut daripada dipindahmilik, dipajak, diturunkan atau digadai kepada sesiapa kecuali seorang yang berbangsa Melayu. Seksyen 108 termasuk, dalam takrifan ungkapan 'pajak', sebarang penyewaan dalam apa sahaja bentuk atau jangkamasa. Perayu memulakan tindakan terhadap penentang dalam mahkamah majistret untuk milikan kosong tanah tersebut. Penyataan tuntutan perayu menyatakan secara nyata, dan bergantung terhadap, perjanjian penyewaan yang menyalahi undang-undang tersebut. Adalah dikatakan bahawa penentang telah gagal mematuhi terma perjanjian penyewaan dan notis keluar. Penentang, dalam pembelaan dan tuntutan balasnya, mencabar kesahan notis keluar, menyatakan bahawa perayulah yang memungkiri terma perjanjian penyewaan tersebut dan menuntut ganti rugi untuk kemungkiran tersebut. Walaupun penentang tidak menyatakan kepenyalahan undang-undang, dia menghujahkan perkara tersebut sebagai suatu bantahan permulaan terhadap locus standi perayu untuk memulakan tindakan semasa pembicaraan. Majistret telah mendengar penghujahan dan membuat keputusan yang memihak kepada perayu atas alasan bahawa penentang merupakan seorang penyewa bulanan, dan oleh yang demikian notis keluar mempunyai kesan menamatkan perhubungan tuan tanah dan penyewa. Penentang kemudiannya merayu kepada pesuruhjaya kehakiman yang membicarakan kes atas dasar bahawa perjanjian penyewaan tersebut adalah menyalahi undang-undang dan terbatal, dan memutuskan bahawa tuntutan perayu gagal. Perayu membuat rayuan, dan adalah dihujahkan bahawa kesan keputusan pesuruhjaya kehakiman tersebut adalah untuk membenarkan penghunian tanah tersebut oleh seorang yang tidak dibenarkan oleh statut untuk milikan.

Diputuskan, menolak rayuan itu:

(1) Kepenyalahan undang-undang tidak perlu dinyatakan dalam pliding secara khusus, dan jika kepenyalahan undang-undang dibawa kepada perhatian mahkamah sebelum tindakan dibicarakan, mahkamah, selepas berpuas hati bahawa urusniaga yang berkenaan adalah sesungguhnya menyalahi undang-undang, berkewajipan untuk bertindak terhadapnya (lihat ms 146C–D); *Natha Singh v Syed Abdul Rahman & Anor* [1962] MLJ 265 dan *Nasib Singh v Ramasamy* [1969] 1 MLJ 211 diikut.

(2) Pernyataan tuntutan perayu menuntut milikan kosong secara nyata atas dasar bahawa penentang telah membuat tindakan yang memungkiri perjanjian penyewaan tersebut. Ekoran itu, perayu telah bergantung kepada kepenyalahan undang-undang untuk menuntut milikan tanah tersebut. Dengan itu, ini merupakan suatu kes di mana maxim *ex turpi causa non oritur actio* terpakai dengan sepenuhnya (lihat ms 147I and 148A).

(3) Pihak-pihak dalam kes ini adalah dalam pari delicto apabila mereka mengikat perjanjian penyewaan yang menyalahi undang-undang itu. Bagaimanapun, perjanjian penyewaan tersebut disediakan oleh seorang peguamcara. Oleh itu, ini bukan merupakan suatu kes di mana kontrak boleh didapati terbatal di bawah s 66 Akta Kontrakc1950 (lihat ms 148B); *Soh Eng Keng v Lim Chin Wah* [1979] 2 MLJ 91 diikut.

(4) Dalam kes ini, perayulah yang melanggar terma statut dan menghadapi risiko perlucuthakan tanah tersebut oleh pihak berkuasa negeri (lihat ms 148D).

(5) Adalah merupakan undang-undang mantap bahawa harta dalam catel dan tanah boleh dipindah di bawah suatu kontrak yang menyalahi undang-undang dan tidak boleh dikuatkuasakan. Lantaran itu, oleh kerana harta dalam rumah itu telah dipindahkan kepada penentang, dan dia telah menghuni tanah tersebut, kerugian harus ditanggung oleh perayu (lihat ms 148D–E); *Tinsley v Milligan* [1993] 3 All ER 65 diikut.]

[*Editorial Note*: The appellant has appealed to the Federal Court vide Civil Appeal No 08–86–95.]

Notes

For cases on illegality of contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1733–1810.

For cases on pleadings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2506–2772.

Cases referred to

Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors [1986] 1 MLJ 166

Mistry Amar Singh v Kulubya [1963] 3 All ER 499

Nasib Singh v Ramasamy [1969] 1 MLJ 211

Natha Singh v Syed Abdul Rahman & Anor [1962] MLJ 265

Soh Eng Keng v Lim Chin Wah [1979] 2 MLJ 91

Tinsley v Milligan [1993] 3 All ER 65

Legislation referred to

Contracts Act 1950 s 66

National Land Code (Penang and Malacca Titles) Act 1963 s 108

A **Appeal from:** Civil Appeal No 11–20–1994 (High Court, Malacca)

M Ravinathan (Badaruzaman Chandran & Co) for the appellant.
Michael Tan Lip Yip (Goh What Sing with him) *(Ng Goh & Co)* for the respondent.

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Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court): This is an appeal from the decision of Suriyadi Halim Omar JC, reversing the decision
C of the Magistrates' Court at Melaka given in two related actions. Despite the existence of two separate and distinct proceedings, the parties and the courts at both levels have dealt with only one of them. This course was adopted on the footing that the decision in the one case shall determine the outcome of the other. We will follow the example set by both courts below and also deal with the case dealt with by them.

D The appellant before us was the plaintiff in the action before the magistrate, and the respondent, the defendant to that action. For convenience, we will refer to the parties according to the title assigned to them in the trial court.

The facts relevant to the appeal are as follows.

E The plaintiff is the registered proprietor of the land under Lot 66, Kawasan Bandar XXXVI. There is a house on the land. It is occupied by the defendant. The land in question is governed by s 108 of the National Land Code (Penang and Malacca Titles) Act 1963, which prohibits it from being transferred, leased, transmitted or charged to any person other
F than a Malay. The section goes on to include, within the definition of the expression 'lease', any tenancy of whatever form or duration.

By a deed of assignment dated 9 March 1981, the plaintiff absolutely assigned the house to the defendant for a sum of RM10,000. By an agreement of the same date ('the tenancy agreement'), the plaintiff let to
G the defendant that portion of the land on which the house stands, at a monthly rent of RM15. Both documents were prepared by a solicitor. Needless to say that the tenancy agreement was caught by the prohibition contained in s 108.

On 28 May 1993, the plaintiff purported to give to the defendant a
H notice terminating the tenancy and requiring the latter to quit and deliver vacant possession of the premises. The statement of claim accompanying the summons, in para 3, expressly pleads and relies upon the tenancy agreement. In para 6 of his pleading, the plaintiff alleges the defendant's failure to abide by the terms of the tenancy agreement and the notice to quit.

I The defendant, in his defence and counterclaim, challenged the validity of the notice to quit, alleged that it was the plaintiff who was in breach of the terms of the tenancy agreement and claimed damages for

breach. Up to the delivery of this pleading, it does not appear to have been appreciated by either side that the tenancy agreement was utterly illegal and void ab initio.

When the action was called on for hearing, realization of the true legal position must have dawned upon the defendant. Although she had not pleaded illegality, she purported to take the point as a preliminary objection as to the locus standi of the plaintiff to bring or to maintain the action. This was quite wrong of course. What ought to have been done was to move an amendment, and to properly take the point in the defence. Nevertheless, once the illegality of the tenancy agreement had been raised, based upon the agreed documents, the court was obliged to deal with it.

We accept as beyond argument that illegality need not be specifically pleaded, and that once the illegality is brought to the attention of the court before whom the action is being tried, the court, upon being satisfied that the transaction is indeed illegal, is obliged to act upon it. See, *Natha Singh v Syed Abdul Rahman & Anor* [1962] MLJ 265; *Nasib Singh v Ramasamy* [1969] 1 MLJ 211.

Consequently, despite the clumsy way in which the proceedings were conducted by counsel, the magistrate quite properly heard argument and decided in favour of the plaintiff. Having held the tenancy agreement to be void for illegality, she nevertheless ordered the defendant to vacate the land and the premises. Her decision was on the footing that the defendant was a monthly tenant, so that the notice to quit had had the effect of terminating the relationship of landlord and tenant. She also dismissed the counterclaim.

The defendant then appealed to the judicial commissioner who, as we observed at the outset, reversed the magistrate but, quite rightly, does not appear to have interfered with her order dismissing the counterclaim.

In arriving at his decision, the learned judicial commissioner correctly proceeded on the basis that the tenancy agreement was illegal and void. He was much impressed with the injustice of the case, for here, was a plaintiff who had received a large sum of money from the defendant whom he was now seeking to eject and thereby enrich himself. After having reviewed a number of authorities, he turned his attention to the statement of claim which, as we have said, based the plaintiff's claim for vacant possession upon the illegal agreement. The learned judicial commissioner, applying well-settled principles, found the claim to be unsustainable and dismissed the plaintiff's action.

Before us, counsel for the plaintiff sought to attack the learned judicial commissioner's judgment principally in reliance upon the decision of the Privy Council in *Mistry Amar Singh v Kulubya* [1963] 3 All ER 499. It therefore becomes necessary for us to enter upon a discussion of that case.

In *Mistry Amar Singh*, the respondent, Kulubya, an African, owned some Mailo land. He agreed to lease three plots to the appellant, Amar

Singh, an Indian, without obtaining the consents that were made necessary by the relevant East African legislation. The respondent allowed the appellant to remain in possession of the land. Later, he brought an action to recover possession, as well as rent, mesne profits and damages. The appellant pleaded the illegality. Thereupon, the respondent abandoned his claims for rent, mesne profits and damages and confined his claim to vacant possession. The trial judge dismissed the action. On appeal, the East African Court of Appeal reversed the judge and granted the respondent vacant possession. On further appeal, the judicial committee dismissed the appeal.

Lord Morris of Borth-y-Gest, when delivering the advice of the Board, explained the rationale for the decision in words that mark the distinction between that case and the present (at p 503):

> Their Lordships consider therefore that the plaintiff's right to possession was in no way based on the purported agreements. It was the defendant who might have needed to rely on them, because, had they been valid and permissible agreements, the defendant would have contended that the tenancies would have needed for their termination longer periods of notice than those contained in the notices to quit that were given. As it was, the contention of the defendant (based on para 3 of the defence) was that the plaintiff was disabled from suing because he had been a party to illegal agreements. It was quite correct, as set out in that paragraph of the defence, that the plaintiff had been a party to illegal agreements. At the time of the trial, however, he was not basing his claim 'on the said agreements'. Indeed he could have presented his claim (if it were limited to a claim for possession) without being under any necessity of setting out the unlawfull agreements in his plaint. He required no aid from the illegal transactions in order to establish his case. (Compare *Simpson v Bloss* [1816] 7 Taunt 246). It was sufficient for him to show that he was the registered proprietor of the plots of land and that the defendant who was a non-African was in occupation without possessing the consent in writing of the Governor for such occupation and accordingly had no right to occupy. It is true that the plaintiff referred to the purported agreements to which he had been a party and that he repudiated them and acknowledged that they were illegal. It was, however, in spite of and not because of those illegal agreements that he was entitled to possession. Though the plaintiff had offended by being a party to the illegal and ineffective agreements their Lordships do not consider that considerations of public policy demanded the failure of his claim for possession: on the contrary such considerations pointed to the necessity of upholding it in order to eject a non-African who was in unlawful occupation. (Emphasis added.)

It will be seen at once that the fact pattern that emerged in *Mistry Amar Singh* is set apart from the present case, because there the plaintiff merely referred to the illegal agreements in his pleading but did not base his action for vacant possession upon them. The present appeal stands on a different footing altogether. Here, the statement of claim claimed vacant possession expressly on the basis that the defendant had acted in breach of the tenancy agreement. Accordingly, the plaintiff relied upon the illegality to

claim possession of the land. This, therefore, is a case where the maxim *ex turpi causa non oritur actio* applies with full vigour. It is a misfortune that counsel who argued the appeal before us was unable to comprehend this rather simple and obvious distinction in principle, despite it being explained to him more than once during argument.

It cannot be doubted for a moment that the parties in the present case were in pari delicto when they entered into the illegal tenancy agreement. After all, the tenancy agreement was prepared by a solicitor. This is, therefore, not a case where the contract may be said to be discovered to be void under s 66 of the Contracts Act 1950. See, *Soh Eng Keng v Lim Chin Wah* [1979] 2 MLJ 91.

Counsel argued that the effect of the judicial commissioner's decision was to permit the occupation of land by one who is disabled by statute from having possession. There is a short answer to this rather over-simplified statement of consequence. It is the plaintiff who offended the terms of the statute and risked forfeiture of the land by the state authority. For, unlike the East African legislation in *Mistry Amar Singh*, the National Land Code (Penang & Malacca Titles) Act 1963 does not impose any criminal sanction upon an occupant of land to which s 108 applies. It is settled law that property in chattels and land can pass under an illegal, and therefore unenforceable, contract. See, *Tinsley v Milligan* [1993] 3 All ER 65 at p 86. Consequently, the property in the house having passed to the defendant, and he having been put in occupation of the land, the loss should lie where it has fallen.

We have examined the judgment of the learned judicial commissioner with care and have been unable to detect any error of reasoning. In fairness to him, we must say that we find his reasoning and his discussion of the authorities, which in this area of the law are not easily understood, to be beyond criticism.

Accordingly, we dismissed the appeal and affirmed all the orders made by the learned judicial commissioner. We also ordered costs in favour of the respondent and directed the payment out to her of the deposit paid into court to account of her taxed costs. The result in this appeal will bind all connected cases.

Before we conclude this judgment, there is one matter we would refer by way of postscript. Several days after we had dismissed the appeal, solicitors for the appellant before us wrote a letter requesting a review of the case. We, of course, have no jurisdiction to conduct such an exercise. See, *Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors* [1986] 1 MLJ 166. That apart, we find the letter to be couched in intemperate language.

Advocates and solicitors must appreciate their true role if they are to play a meaningful part in the administration of justice. They must accept,

A with courtesy and dignity, decisions which the courts hand down in any case. Taking an unfavourable result in a case as a personal affront to counsel is not consonant with the role of an advocate. We trust that we will not have to issue a similar reminder to other advocates who appear before us.

B *Order accordingly.*

Reported by TA Loh

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